90-815

Supreme Court, U.S.
FILED
OCT 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19____

JOSEPH A. BLAINE,
Petitioner

versus

MARTIN MARMOR AND GOLDIE MARMOR
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL FOR THE THIRD DISTRICT

PETITION FOR WRIT OF CERTIORARI

JOSEPH A. BLAINE
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QUESTIONS PRESENTED

1. Did Florida State Courts deny due process guarantees of the 14th amendment by dismissing a claim `with prejudice' where: (i) at the very first hearing in the case for Respondent's Motion to Dismiss, I had requested additional time to hire an attorney and did not have an opportunity to present my case, and (ii) the complaint included claims of fraud and Usury and presented genuine questions of material fact?

2. Did Florida Third District Court of Appeal violate the Contract Clause of U.S. Constitution by interpreting Florida Usury Statute to impair my rights as a third party beneficiary to a contract, by denying me relief, classifying me as a "stranger to the note"? (Where I was the one who brought the Respondent to make a loan to the mortgagor for my benefit and I was the one who made all monthly payments under the note)

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JURISDICTIONAL GROUNDS

This Petition seeks the review of a judgment of the Third District Court of Appeal for the State of Florida entered on November 14, 1989, for which a Motion for Re-hearing was denied on February 15, 1990. Florida Supreme Court denied the review on July 9, 1990.

The Petitioner requests for the discretionary jurisdiction of the United States Supreme Court. The United States Supreme Court has discretionary jurisdiction to review the decision of Third District Court of Appeal of the State of Florida by writ of certiorari under 28 U.S.C. S$1257 (3) because of the following:

1. Due Process Violation -

The state Court of Appeal has affirmed a grant of Motion to Dismiss `with Prejudice' without granting a full and fair opportunity to be heard to the Petitioner, and thus has decided an important question regarding violation of due process in a way that

conflicts with applicable decisions of this Court and the United States Constitution (U.S. Const. Amend. XIV).

The Petitioner raised the violation of due process issue in Motion for Re-hearing to Third District Court of Appeal by stating:

> "decision of the Trial Court was not based on a hearing of the issue at bar. Appellee (should have been Appellant) did not have his day in Court".

Petitioner's Jurisdictional brief to Florida Supreme Court presented violation of due process rights of the Petitioner as:

> the Third District Court od Appeal affirmed a trial Court's decision where the Petitioner was not afforded an opportunity to be heard. This affirmation by the District Court is in direct conflict with the due process requirements as per decision of 5th Dist. Ct. of Appeal in Fla. State Society of Homeopathic Physicians et al. v. Florida Department of Professional Regulations, 487 So.2d 374 (Fla. 5th DCA 1986).

2. Impairment of Contract -

The Third District Court of Appeal of the State of Florida has applied Florida Usury Statute to impair the constitutionally granted

substantial rights of the Petitioner as the third party beneficiary to a note by denying relief on the basis of their classification of the Petitioner as `a stranger to the note' and thus has violated the Contract Clause of the U.S. Constitution. (U.S. Const. Art. 1 S10).

Florida Usury Statute as applied by the Third District Court of Appeal for State of Florida impairs the rights of a Third Party Beneficiary under a Contract. Petitioner raised this question in reply brief to the Third District Court of Appeal. Petitioner stated that Petitioner stood in the shoes of Cutliff because of his agreement as well as because he made payments owed by Helen Cutliff to Martin and Goldie Marmor. As Petitioner further stated:

> these payments and their acceptance by the Appellees, vested in him the rights of a third party beneficiary. When a party both knows and intends that certain obligations be performed by a third rather than the original contracting party, that third party becomes an intended beneficiary of the contract. Under Florida law, a third party beneficiary

need not be named in a contract. [His] status may be established by the pre and post-contract conduct of the parties. Florida Power & Light Co. v. Mid Valley, Inc., 763 F.2nd. 1316, 1317 (11th Circuit 1985). "A third party beneficiary stands in the shoes of the promisee and is subject to terms and conditions of the contract it intends to invoke". Consolidated Partners, Ltd. v. Rederiaktiebolaget F. Gustaf Erikson, 645 F.Supp., 884, 885 (S.D. Fla. 1986).

Again, in Addendum to Motion for Re-hearing to Third District Court of Appeal, Petitioner stated in paragraph four

the dealings between Cutliff and Blaine unequivocally demonstrates that they intended the formal agreement to cover in substance all the participants in the undertaking, including Blaine as an intended 3d party beneficiary of the note. As such, Plaintiff is entitled to the protective umbrella of the note and provision of the contract. "The pre-contract dealings of the parties, the contract itself, and the subsequent dealings of the parties show that the clear intent and purpose of the contract was to directly and substantially benefit the Plaintiff.

Again in the jurisdictional brief filed with Florida Supreme Court one of the arguments made by the Petitioner was that:

the decision of the District Court of Appeal in this case expressly and directly conflicts with the decision of this Court regarding the rights of third party beneficiary

established in controlling cases like Auto Mutual Indemnity Co. v. Shaw, 134 Fla. 815, 184 So. 852 (1938).

Thus, Petitioner have at each step raised the issue of due process violation as well as the issue of an impairment to the contract rights granted to him by federal constitution. The Petitioner requests this Honorable Court to grant this writ of certiorari and review this question of great public importance so that

(1) no other citizen is deprived of his or her due process rights by the judicial system through their arbitrary denial of a full and fair opportunity to be heard to a claimant, and

(2) so that no state law would work to impair the rights of parties under a contract

STATEMENT OF THE CASE

The Trial Court dismissed `with prejudice' my

action (in which I represented myself) to recover the payments made to the Respondent, mortgagees, under a usurious mortgage. Respondents were aware of the fact that I was a third party beneficiary under the note as I was the one who had arranged for the Respondent to make the loan to one Helen Cutliff (from now "Cutliff") for my benefit. A hearing was held on December 20, 1989, for `Respondent's Motion to Dismiss with Prejudice'. I requested the Court to grant me an extension of time to accumulate funds to acquire the services of an attorney to represent me at the hearing. The Court held back its decision and promised to let me know in a few weeks. In about that time, the Court denied my request for time by entering an order of dismissal with prejudice without any written opinion. I never had an opportunity to present my case against the Motion to Dismiss.

On appeal, Third District Court of Appeal of

the State of Florida, affirmed the trial court's decision by holding that I was a "stranger to the note", and as such was not entitled to any help under Florida Usury Statute. I filed a Motion for Re-hearing of Third District Court of Appeal's decision, stating that the trial court did not give me an opportunity to present my evidence, as such, I did not have my day in court. Third District Court of Appeal denied re-hearing on February 15, 1990. I tried to reach Florida Supreme Court on the basis that the decision of the Third DIstrict Court of Appeal was in conflict with decisions of other District Courts of Appeal in the State of Florida. The jurisdictional brief said that I was denied my constitutionally guaranteed right of due process and Florida Usury Statute reduced my rights as a third beneficiary to the note by denying me relief by calling me a "stranger to the note". Florida Supreme Court refused to

accept jurisdiction. I file this Writ of Certiorari to the United States Supreme Court as matter of great public interest.

STATEMENT OF FACTS

In 1977, I (through a corporation), had a lease with an option to buy a dilapidated hotel in the City of Miami, Florida. The hotel had been on sale for six years before I decided to tackle it and entered into an agrement to lease the hotel with an option to buy. Under this agreement, I started renovating the hotel. I used my income from other properties as well as my veteran administration disability checks to improve the property. I needed cash to exercise the option to purchase the hotel. I entered into an agreement with a friend, Helen Cutliff (from here on "Cutliff"). Cutliff was to borrow forty-five thousand ($45,000.00) dollars in her name to help me exercise my

option to purchase the hotel. But, in order to get a mortgage for forty-five thousand dollars, Cutliff had to take the property in her name. Cutliff was to return the hotel back to me after a payment of twenty thousand ($20,000.00) dollars, (previously lent to me by Cutliff). I contacted the Respondents to make a loan to Cutliff on the hotel for my benefit. Respondents made a loan to Cutliff in an amount of forty-five thousand ($45,000.00) dollars made her sign a note and mortgage for fifty five thousand ($55,000.00) dollars - a usurious mortgage.

I was to pay back twenty thousand dollars to Cutliff and assume Cutliff's mortgage to Marmor and receive the title to the hotel. Until I paid the twenty thousand dollars to Cutliff, I was to operate the hotel, make the mortgage payments and take care of any shortages in the cash flow. I operated the hotel as per the agreement, made all the renovations, paid all

the bills and took my VA disability checks and income from other properties to make the payments for the short cash flow of the hotel.

In January 1983, some of my creditors filed an involuntary bankruptcy against me. In late 1983, (after I was illegally ejected from the hotel, and no longer had excess to the records), Respondents filed a foreclosure action against the property and Cutliff alleging non-payment of September 1983 mortgage payment while they had already cashed September payment. Respondents requested the bankruptcy court for a relief from automatic stay in bankruptcy to proceed with the foreclosure action, (an evidence that they were aware of my interest in the property and the note). Finally, the relief was granted and the mortgage foreclosure action proceeded. But, in the foreclosure action, I was not named as one of the parties. I filed this action to get relief under Usury Statute for the payments

made by me to the Respondents under the usurious mortgage. Respondents filed a Motion to Dismiss my Complaint alleging res judicata for foreclosure action and alleging that I was a `stranger to the note', (knowing full well that my money went into that hotel, that I was the one who brought the Respondent to make the loan to Cutliff for my benefit and knowing that I was the one who made every single mortgage payment to Respondents). Respondents failed to notify the Court that in the foreclosure action, I was not a party to the action and that the case was settled and was never decided on its merits. On the day of hearing Respondent's Motion to dismiss with Prejudice, I requested Honorable Judge Amy Steele Donner to grant me additional time to retain the services of competent attorney, for which the court held back the decision. Later, the Trial Court entered an order of dismissal with prejudice from which I tried o get a review

from Third District Court of Appeal for the State of Florida. Third District Court of Appeal went along with the Trial Court's decision below per curiam by stating:

> the record shows that Appellant is a `stranger to the note' as to which he seeks to recover allegedly usurious payments. Dismissal of Plaintiff's action is affirmed. (See Nesbitt v. Citicorp. Savings, 514 So,2nd, 371 (Fla.3rd.DCA 1987. Affirmed).

The Court of Appeal substituted itself as a trier of fact and decided on the factual issues rather than remanding it to the Trial Court for an evidentiary hearing. I tried to take the case to the Florida Supreme Court on the basis that my due process rights were violated as well as Florida Usury Statute impaired my rights as a third party beneficiary under the contract. Florida Supreme Court denied the review and this petition follows.

ARGUMENTS

ARGUMENT I

Did Florida State Courts deny due process guarantees of the 14th amendment by dismissing a claim `with prejudice' where: (i) at the very first hearing in the case for Respondent's Motion to Dismiss, I had requested additional time to hire an attorney and did not have an opportunity to present my case, and (ii) the complaint included claims of fraud and Usury and presented genuine questions of material fact?

Due process guarantees of the fourteenth amendment to the individuals express a requirement of "fundamental fairness". Due Process, as defined by Florida Supreme Court, itself in Kurtz v. Kurtz, 150 So 785 (Fla. 1933) is as follows:

> Due Process of Law imports notice and an opportunity to be heard and to defend in an orderly proceeding adopted to the nature of the case.

According to this Court in Lassiter v. Department of Social Service of Durham County, 101 S.Ct. 2153, 2163 (1981), "our constitution imposes on States the standards necessary to insure that judicial proceedings are

fundamentally fair".

If the facts of a case, present possible due process violation, it empowers the U.S.Supreme Court to "consider the Due Process Issue" as said by this Court in Wood v. Georgia., 101 S. Ct. 1097, 1100, 450 U.S. 261, 265 (1981). If the interests of justice so requires, this Court has in past and should in this case grant a review of the state decision.

The law abhors the denial of access to the courts for any reason other than a willful abuse of the processes of the court. Such a willful disregard of the rules of court will not be ordinarily shown by record which does not show the violation of a specific order of the court. In the case at bar, I did not violate any Court Order. I was deprived of my property without due process of law. There were claims of fraud, and violation of Florida Usury Statute in the complaint. There were enough issues of fact, which required an

evidentiary hearing at least.

As per Florida and Federal law

> "for the purpose of a Motion to Dismiss, the material allegations of the complaint are taken as admitted.--- and the complaint is to be liberally construed in favor of Plaintiff--the complaint should not be dismissed unless it appears that Appellant could prove no set of facts in support of his claim which would entitle him to relief".

Jenkins v. McKeithen, 89 S. Ct. 1843 (1969).

Justice Marshall and the other Justices used these rules as they decided in Jenkins that a complaint against a commission that worked as an executive trial agency designed to condemn without affording traditional trial rights of cross examination or presentation of evidence, had enough material facts to be considered by the Court and thus a motion to dismiss was improper. In the case at bar, I did not even have an opportunity to be heard as I never presented my case at the day of hearing for Respondent's Motion to Dismiss. Discussions were limited to granting an extension of time

to the Petitioner for retaining a competent counsel. I was awaiting the court's decision on my request for extension of time when I received an order stating that my complaint itself was dismissed with prejudice. This was a clear denial of access to the courts. The Court will grant a Motion to Dismiss with Prejudice only where it appears to a certainty under existing law, that no relief can be granted under any set of facts, as per this Court in Connely v, Gibson, 355 U.S. 41, 45-46, 78 Supreme Court 99, 101-102, 2 L.Ed. 80 (1957).

> "The issue is not whether the Petitioner is likely to succeed on the merits, but whether Petitioner is entitled to proceed beyond the threshold in attempting to establish her claims."

De La Cruz v. Toremy, 582 F.2nd. 45, 48 (9th Circuit 1978).

My case involved a claim of Usury which has been held to be an issue of fact to be determined at trial as per Florida Courts.

See Wells v. Freedman, 342 So.2d 983 (Fla. 3d DCA, 1977) where the Court held that there were present issues of material fact remaining to be tried in that cause, "Usury is ordinarily an issue of fact to be determined at trial", Kellerman v. Siegal, 319 So.2d 581, (Fla 3d DCA, 1975)." In Wells, Court decided that a grant of summary judgment was improper where usury was an issue. In this case, where usury was at issue, thus, a grant of a motion to dismiss with prejudice, decided without a full hearing on the facts, was improper also.

Federal Court of Appeal of 11th circuit held in Beausejour Corporation, N.V. v. Offshore Development Company, Inc., 802 F.2d 1319, 1320 (11th Cir., 1986) "Whether or not a transaction is subject to the Usury Laws of Florida is a question of fact. Burkett v. Johnson, 61 So. 2d 197, 198 (Fla. 1952)." In the case on review here, at the Motion to Dismiss hearing (when no discovery was held, and the case had

just been instituted) the Court should not have said as a matter of law that I did not have a claim. It was violation of due process law for the Court to decide that I could prove no set of facts that might have entitled me to prevail in my claim of fraud and usurious mortgage. The facts proved that I was a third party beneficiary of the note. The facts showed that the mortgage might have been usurious. The facts showed that I was not named in the prior foreclosure action. The facts showed that the prior foreclosure action was not decided on merits. Still the Trial Court found no possibility of finding a relief for my claims.

The Trial Court could not substitute itself for a trier of fact and decide factual issues in granting a Motion to Dismiss with Prejudice. The Motion to Dismiss itself cannot be granted unless the moving party proves that there are no facts giving rise to a possible judgment in favor of claimant. A Motion to Dismiss with

Prejudice has a higher burden of proof on the moving party to show that not only is there no claim on which the relief can be granted, but also claimant should not be allowed to proceed with this action in any other form possible, which the Respondent failed to do.

In this case there was not even a hearing provided to present my case as the hearing was closed after the discussions regarding extension of time to retain a counsel. Not only that I was refused an evidentiary hearing for the issues of material facts, I was denied an opportunity to be heard at all denying me the due process guarantees of 14th amendment of our Constitution.

Therefore, I request the Honorable United States Supreme Court to take the jurisdiction in this case and send a clear signal to the judicial system and the public that no one will be denied an opportunity to be heard.

ARGUMENT II

Did Florida Third District Court of Appeal violate the Contract Clause of U.S. Constitution by interpreting Florida Usury Statute to impair my rights as a third party beneficiary to a contract, by denying me relief, classifying me as a "stranger to the note"? (Where I was the one who brought the Respondent to make a loan to the mortgagor for my benefit and I was the one who made all monthly payments under the note)

The language of the Contract Clause of U. S. Constitution is unambiguously absolute:

"No State shall ...pass any ...Law impairing the obligation of Contracts". U. S. Const., Art. 1, $10.

Florida Usury Statute, itself does not violate the Contract Clause of our constitution. But the interpretation of this Statute in this case by the Florida Courts has impaired the long established rights of a third party beneficiary to the contract. Florida Third District Court of Appeal affirmed the Trial Court's decision by stating:

> the record shows that Appellant is a `stranger to the note' as to which he seeks to recover allegedly usurious payments.

Dismissal of Plaintiff's action is affirmed. (See Nesbitt v. Citicorp. Savings, 514 So,2nd, 371 (Fla.3rd.DCA 1987).

I was appellant in third District Court of Appeal. I am a third party beneficiary of a note and mortgage that was executed by Cutliff in favor of the Respondent for my benefit. I had contacted the Respondent so that Cutliff could borrow some funds from the Respondent to exercise the option to buy a property that I had. The property was bought in Cutliff's name to be transferred to me after I paid her $20,000 that I owed her for the renovations to the property. Therefore, I was neither on the title of the property nor was I named in the note or mortgage. But, I was the one for whose benefit the property was bought, the loan was taken as well as who arranged for the loan, made all the mortgage payments to the Respondent, and took care of the operation of the Hotel. Respondent was well aware of the

fact that I was a third party beneficiary of the transaction.

Court of Appeal ignored my rights of a third party beneficiary who could be a `stranger to a contract' as per well established Florida law. In this case I was not a `Stranger to the contract' as I was the party responsible to bring the transaction to the completion. All the parties involved were aware of the fact that I was the real party in interest. Even if I was a `stranger to the Note', I was entitled to all the rights that a party named under the contract did because I was the real party in interest, who was also the party performing on the note. Florida Supreme Court has followed U.S. Supreme Court in recognizing that a third party beneficiary steps in the shoes of a party to the contract and thus would be entitled to all the privileges and the obligations under the contract. In Florida Supreme Court's words:

> ....of Course, a third person, a stranger both to the contract and the consideration, may enforce a promise for the purpose of benefiting him, according to the overwhelming weight of American authority.....where a person engages another for a benefit of a third, the latter who would enjoy the benefit of the act may maintain an action for the breach of such engagement, the law operates upon the acts of the parties, creates a duty, establishes a privity and implies the promise and the obligation.

Auto Mutual Indemnity Co. v. Shaw, 134 Fla. 815, 184 So. 852, 856 (1938).

Thus, the rights of a third party beneficiary, even if a `stranger to the note', are full and complete to the same extent as that of a `party to the note'. The contractual rights and obligations as per established laws are guaranteed by the Constitution against impairment. The states are not allowed to impair the rights and obligations of the partes to a contract. Third Dist. Ct. of Appeal, in this case, has refused the protection of Florida Usury Statute to a third party beneficiary by calling him a `stranger to the

Note' while this protection is available to a `party to the note' and thus should also be available to the same extent to a third party beneficiary, stranger or not. This Court has held:

> If the Contract Clause is to retain any meaning at all, however, it must be understood to impose some limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power. The existence and nature of those limits were clearly indicated in a series of cases in this Court.....

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S. Ct. 2716, 57 L.Ed.2d 727 (1978).

One of the limits imposed on the State's otherwise legitimate police power, by the contract Clause of our Constitution, as indicated by This Court, includes that even in an emergency, imposed conditions should be reasonable. Denial of protection of Florida Usury Statute to a third party beneficiary does not have any reasonable basis and thus works to make the Florida Usury Statute repugnant to the

Contract Clause of the U. S. Constitution.

Therefore, I request this Honorable Court to take the Jurisdiction of this case and stop this impairment of contract rights by the State Courts.

CONCLUSION

Florida Court of Appeal has violated my due process rights by affirming Trial Court's `with prejudice' dismissal (without giving me an opportunity to be heard) of my complaint which included the genuine issues of material fact of fraud and usury. Florida Ct. of Appeal also interpreted the Florida Usury Statute to impair my rights as a third party beneficiary even where I was the party for whose benefit the note and mortgage was executed. Florida Supreme Court has denied to speak on the issue. Therefore, I request this Highest Court of Law to take the Jurisdiction of this case and decide these issues of great public interest.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of this petition was mailed to GENET & MILNER, Counsel for the Respondent, at 99 N.E. 1167th Street, North Miami Beach, Florida 33162, on 13th Nov., 1990.

By: _____
JOSEPH A. BLAINE
P.O Box 364
Miami Shores, FL 33153
(305) 893-9565

Sworn to and subscribed before me this 13th of November, 1990.

_____
NOTARY PUBLIC, STATE OF FLORIDA AT LARGE

NOTARY PUBLIC, STATE OF FLORIDA.
MY COMMISSION EXPIRES: OCT. 21, 1994.
BONDED THRU NOTARY PUBLIC UNDERWRITERS

My Commission Expires:

APPENDICES

NOT FINAL UNTIL TIME EXPIRES\
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1989

JOSEPH A. BLAINE, **

Appellant, **

vs. ** CASE NO. 89-288

MARTIN MAMOR and GOLDIE ** MARMOR,

Appellee. **

Opinion filed November 14, 1989.

An Appeal from the Circuit Court for Dade County, Amy Steele Donner, Judge.

Scott Greefield, for Appellant.
Genet & Milner and Donald G. Criscuolo, for Appellee.

Before SCHWARTZ, C.J., and BARKDULL and COPE, JJ.

PER CURIAM
As the record above that Appellant is a "stranger to the note" as to which he seeks to recover allegedly usurious payments, dismissal of plaintiff's motion is affirmed. See Nesbitt v. Citicorp Savings, 514 So.2d 371 (Fla. 3d DCA 1987).
Affirmed

SUPREME COURT OF FLORIDA

MONDAY, JUL 9, 1990

JOSEPH A. BLAINE,

Petitioner

Case No. 75,746

vs.

MARTIN MARMOR and GOLDIE MARMOR,

Respondents.

District Court of Appeal, 3d District No:89-288

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the COUrt. Se FLa. R. App. P. 9.330(d).

OVERTON, ACTING C.J. McDONALD, EHRLICH, GRIMES and KOGAN, JJ., Concur.

cc: Hon. Louis J. Spellnoe, Clerk
Hon. Richard P. Brinker, Clerk
Hon. Amy Steele Donner, Judge

Damodar S. Airan, Esquire
Donald G. Criscuolo, Esquire
of Genet & Milner

seal
Clerk of Supreme Court

IN THE SUPREME COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1990

FEBRUARY 15, 1990

JOSEPH A. BLAINE,	**	CASE NO. 89-00288
Appellant,	**	
vs.	**	
MARTIN MAMOR et al,.	**	LOWER TRIBUNAL NO. 85-30866
Appellee.	**	

Upon consideration, appellant's motion for rehearing is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLNOE

Clerk District Court of
Appeal, Third District

By:_____
Chief Deputy Clerk

cc: Richard J. Feinberg Joseph A. Blaine
Scott Greenfield
/MB

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO 88-37201 (6)

JOSEPH A. BLAINE,

Plaintiff,

vs.

MARTIN MARMOR and
GOLDIE MARMOR.

Defendants.
_____/

ORDER

THIS CAUSE having come on to be heard on Defendant's motion to dismiss with prejudice and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is hereupon

ORDERED AND ADJUDGED that said Motion be, and the same is hereby granted.

DONE AND ORDERED in Chambers, at Dade County, Florida, this 20th day of December, 1988.

Amy Steele Donner
Circuit Judge

Copies furnished:

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Miami Shores, FL 33153

Richard Feinberg, Esq.
99 N.E. 167 St.
N. Miami Beach, FL 33162

(2)

No. 90-815

Supreme Court, U.S.
FILED
DEC 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term 1990

JOSEPH A. BLAINE,

Petitioner,

vs.

MARTIN MARMOR AND GOLDIE MARMOR,

Respondents.

Petition For A Writ Of Certiorari To The United States Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether or not Petitioner was denied due process when his original complaint was dismissed with prejudice upon concluding that he was a stranger to the note that was allegedly usurious for which he sought money damages.

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Fla. Stat. 687.04 ..... 1, 4

STATEMENT OF THE CASE AND FACTS

Petitioner, Blaine, initiated the action below by filing a single count complaint which sought to recover allegedly usurious interest. The interest that was allegedly usurious was paid pursuant to a promissory note executed by Helen Cutliff and secured by a mortgage on the New Willard Gardens Hotel, then owned by Helen Cutliff. As an attachment to his complaint, Blaine attached as Exhibit 1 a mortgage between Blaine and Cutliff, the then owner of the New Willard Gardens Hotel. As an Exhibit 2, he attached a contract between himself and Cutliff. That contract provided, *inter alia*, that Blaine had the right to manage and operate the New Willard Gardens Hotel and keep all the profits therefrom and was required to pay all the expenses of operation. Blaine's complaint asserted that because he made the mortgage payment of $825.00 per month as an operating cost of the hotel and because the interest was allegedly usurious under the promissory note that he should be entitled to sue for damages in the amount of double the interest payments pursuant to Fla. Stat. 687.04.

Respondents, Marmor, filed a Motion to Dismiss with Prejudice and asserted that the usurious nature of the note was already litigated between the real parties to the note and was therefore *res judicata*. (Resp.App.1) The Motion to Dismiss further asserted that Blaine had no standing to sue because he was a stranger to the note. A hearing was held before the trial court at which Blaine represented himself and the Respondents were represented through counsel. At that time, counsel for Marmor argued that the usurious nature of the note was already litigated by the real parties to the note in another

action in that same circuit. Upon hearing that, the trial judge determined that she needed to review the court file of that lawsuit to determine the validity of the *res judicata* argument and therefore reserved ruling for that purpose. Subsequently, the trial court entered an Order of Dismissal with Prejudice from which Blaine sought review. The Third District Court of Appeal affirmed per curiam and specifically found that Blaine was a stranger to the note and therefore could not sue thereunder. (Petitioner's App.1). Blaine sought rehearing from the Third District Court of Appeal which was denied. (Petitioner's App.3). Blaine sought *certiorari* from the Supreme Court of Florida which was denied. (Petitioner's Exhibit 2).

In order to properly understand the nature of the dispute, it is necessary to set forth the facts of prior litigation regarding the hotel and between the parties thereto.

In 1982, Helen Cutliff borrowed $55,000.00 from the Marmors and executed a promissory note for that sum secured by a mortgage on the New Willard Gardens Hotel. Thereafter, Cutliff defaulted under the note and Marmor filed a Mortgage Foreclosure Complaint. In that lawsuit, Cutliff filed an Answer and raised therein as an affirmative defense the usurious nature of the note. (Resp.App.3-4) The mortgage foreclosure action was resolved between the parties thereto, Cutliff and Marmor. A Final Consent Judgment of Foreclosure was entered by the trial court. When the amount of the judgment was not paid, Marmor was a successful bidder at sale and became the owner of the hotel.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Petition should be denied because the Petitioner Blaine was not deprived his due process as he asserts.

The Appellant would have this Court believe that he was denied due process rights which then becomes a federal question which would arguably confer jurisdiction upon this Court. However, a review of what happened below clearly establishes that the Defendant was afforded his due process rights. On September 21, 1988, the Petitioner was notified that a Motion to Dismiss had been filed. (Resp.App.1). It was not until December 20, 1988, that a hearing was held on the Motion to Dismiss. At that time, Blaine actually appeared and was heard in opposition of the Motion. Under such circumstances, the Appellant is hard pressed to assert that he was not afforded his due process rights. His claim can more accurately be stated by saying that three months is insufficient time in which to prepare to defend a simple Motion to Dismiss. Blaine chose not to retain counsel. That was his choice. The fundamental requirements of procedural due process under both the State of Florida and Federal Constitutions are reasonable notice and fair opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976). In the case before the Court, there is not a scintilla of doubt as to whether Blaine received reasonable notice and reasonable opportunity to be heard.

After the trial court entered an Order dismissing the complaint with prejudice, Blaine decided to secure the services of competent counsel and was represented by Scott Greenfield, Esquire, in Florida's Third District Court

of Appeal and was represented by Damodar S. Airan, Esquire, in the *certiorari* proceeding before the Florida Supreme Court. Mr. Blaine had an opportunity to convince the trial court he was correct, the intermediate Appeal Court he was correct and the Florida Supreme Court he was correct. In all those proceedings, it was determined that his action should fail. Those decisions, based purely upon state law, are correct and this Court should decline to grant *certiorari* to review those state law determinations by state courts.

2. Blaine is a stranger to the note and as such has no standing to sue to recover payments that were allegedly usurious.

Blaine misstates the facts and misunderstands the law when he attempts to characterize himself as a third party beneficiary of the note and mortgage between Cutliff and Blaine. The note and mortgage between Cutliff and Blaine was between the two of them and only the two of them. If the payments were in violation of the usury statute, then the owner of the note and mortgage would have standing to make a claim for damages in double the amount of the interest payments pursuant to Fla. Stat. 687.04. The written contract between Cutliff and Blaine put those parties in the position of landlord and tenant. Cutliff owned the hotel and leased it to Blaine. The rent Mr. Blaine was to pay would be the amount of the mortgage payment so that Cutliff would have no carrying cost. Blaine absurdly mischaracterizes himself as the "real borrower" under the note and mortgage. In fact, Mr. Blaine is nothing more than a tenant paying $825.00 per month for rent. To characterize Blaine as anything

more would be grossly inaccurate. Blaine is not the promisor under the note, he is not the obligor under the note, he is not the real or substantial debtor under the note, he is not related to the note in any way, shape or form. Blaine is a total stranger to the note and upon breaching the note, would not be liable under the note and would not be a named defendant in a lawsuit to enforce the note. Under Florida Law, a stranger to the note may not sue to recover allegedly usurious payments. *Nesbitt v. Citicorp Savings*, 514 So.2d 371 (Fla. 3d DCA 1987). Florida's Third District Court of Appeal found that the record before it established, as a matter of fact, that Blaine was a "stranger to the note". (Pet. A-1). This Court affords respectful consideration and great weight to the views of a state's highest court on matters of state law and customarily accepts factual findings of state courts in the absence of exceptional circumstances. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed. 2d 233 (1980).

This Court has no supervisory jurisdiction over state courts and in reviewing a state court's judgment is confined to evaluating it in its relationship to the Federal Constitution. *Chandler v. Florida*, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed. 2d 740 (1981).

In the case before the Court, Blaine strains to present a federal question to this Court to support this Court's exercise of *certiorari* jurisdiction. However, an application by a state court of state law does not raise a federal question appropriate for review by this Court. *Agins v. City of Tiburon*, 65 L.Ed. 2d 106, 111 n.6, 447 U.S. 255, 100 S.Ct. 2138 (1980).

Lastly, the matter of the usurious nature of the note is *res judicata* in that that matter was already litigated and raised in the mortgage foreclosure action initiated by Blaine against Cutliff when Cutliff filed an Answer. and raised usury as an affirmative defense. (Resp.App.2).

CONCLUSION

The Petition for Writ of Certiorari should be denied or alternatively this Court should affirm the decision of the Court below.

Respectfully submitted,

DONALD G. CRISCUOLO
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Attorneys for Respondent

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 88-37201

FLORIDA BAR NO. 347612

JOSEPH A. BLAINE

Plaintiff

v.

MARTIN MARMOR and GOLDIE MARMOR

_____/

DEFENDANTS [sic] MOTION TO DISMISS WITH PREJUDICE

The Defendants, MARTIN MARMOR and GOLDIE MARMOR, by and through their undersigned attorney hereby file this, their Motion to Dismiss with Prejudice and would state as follows:

1. That the Plaintiff, JOSEPH A. BLAINE, is a stranger to the referenced note and therefore has no standing to file this Complaint alleging a usurious interest rate.

2. That the Plaintiff's cause of action is bared [sic] by the doctrine of res judicata as the alleged claim of usury on this same note has already been litigated in the case of *MARTIN MARMOR and GOLDIE MARMOR v. CHARLES MILLER, GWENDOLYN MILLER and HELEN CUTLIFF*, Case No. 83-38909 CA 23 in Dade Circuit Court.

That a final judgment was entered in that case and is currently up on appeal.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to JOSEPH A. BLAINE, P.O. Box 364, Miami Shores, Florida 33153 on this 19 day of September, 1988.

GENET & MILNER
Attorneys for Defendants
99 N.E. 167th Street
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(305) 653-0455 Dade
(305) 925-0889 Broward

/s/ Sandor F. Genet
SANDOR F. GENET

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 83-38909 CA 23

MARTIN MARMOR and GOLDIE MARMOR, Plaintiffs, vs. CHARLES K. MILLER, GWENDOLYN M. MILLER, and HELEN CUTLIFF, Defendants.	ANSWER OF DEFENDANT, HELEN CUTLIFF

Defendant, HELEN CUTLIFF, files her answer and affirmative defenses and states as follows:

1. The allegations contained in Paragraph 1 are admitted.

2. The allegations contained in Paragraph 2 are denied.

3. Defendant is without knowledge of the allegations contained in Paragraph 3 and demands strict proof thereof.

4. The allegations contained in Paragraph 4 are denied.

5. Defendant is without knowledge of the allegations contained in Paragraph 5 and demands strict proof thereof.

6. The allegations contained in Paragraph 6 are denied.

7. Defendant is without knowledge of the allegations contained in Paragraph 7 and demands strict proof thereof.

8. Defendant is without knowledge of the allegations contained in Paragraph 8 and demands strict proof thereof.

AFFIRMATIVE DEFENSES

1. Plaintiff failed to fully fund the alleged promissory note which secured the alleged mortgage.

2. Plaintiff received interest upon the alleged promissory note in excess of the highest lawful rate.

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 22nd day of February, 1984, to: DONALD G. CRISCUOLO, ESQ., GENET MILNER, Attorneys for Plaintiffs, 150 N.W. 168th Street, Suite 330, North Miami Beach, Florida 33169, and to: ROBERT SUMMERS, ESQ., SUMMERS AND MAKEMSON, P.A., Attorneys for Defendants, MILLERS, 200 Seminole Street, P.O. Box 538, Stuart, Florida 33494.

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BY: /s/ Paul M. Bauch
PAUL M. BAUCH

Attorneys for Defendant,
CUTLIFF